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3 December 2002

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Qwest Communications International, Inc. Colorado/Idaho/Iowa/Nebraska/North
Dakota/Montana/Washington/Wyoming/Utah, WC Docket No. 02-314

Dear Ms. Dortch:

On December 2, 2002, the undersigned, together with Megan Doberneck of Covad Communications Company, made an *ex parte* presentation to Sam Feder, legal advisor to Commissioner Kevin Martin. The purpose of the meeting was to discuss Covad's serious concerns over Qwest's discriminatory pricing of the unbundled high frequency portion of the loop and Qwest's failure to show that it provides competitors with non-discriminatory access to loop qualification information.

Covad has repeatedly raised the clear violations of the Commission's TELRIC pricing rules perpetrated by Qwest's rates for the UNE high-frequency portion of the loop (UNE HFPL) in Colorado and Washington. The positive rates for UNE HFPL in Colorado and Washington were picked arbitrarily out of a hat, without even the pretense of a cost study demonstrating the forward-looking per-unit costs of UNE HFPL, as required under the Commission's rules.¹ Moreover, Qwest's positive, non-zero rates for the UNE high-frequency portion of the loop enable Qwest to double-recover loop costs it already recovers in its rate structure for basic voice services. In fact, for a line-shared loop, Qwest knows that the high-frequency portion of the loop creates no incremental loop cost. Whatever costs Qwest does actually incur to provide access to the high-frequency portion of its existing loops Qwest recovers separately, in its recurring and non-recurring UNE rates for provisioning, cross-connects, splitters, collocation, and OSS. The loop, however, including its high-frequency portion, must already be deployed and in service to provide ILEC voice service, without which Covad's line shared services cannot be offered.² Qwest itself has argued before state commissions that no loop costs should

¹ See 47 C.F.R. § 51.505(e).

² See 47 C.F.R. § 51.319(h)(3).

be allocated to services other than local voice services, because it regards additional services as generating no incremental loop costs.³ Here, however, simply in order to gain 271 authority, Qwest appears willing to depart from its own pricing positions. Qwest's inconsistencies cannot salvage the obvious defects in its rates for UNE HFPL in Colorado and Washington. Without these clear TELRIC violations being remedied, Qwest's applications for 271 authority in those states cannot be granted.

In addition, none of Qwest's pending 271 applications for any state can be granted until the serious deficiencies in Qwest's OSS for the provision of loop makeup information to competitors are remedied. Covad has repeatedly shown the need for pre-order access to MLT testing as a remedy to the significant deficiencies in Qwest's OSS for loop makeup information.⁴ Put simply, Qwest has failed to meet its required burden for establishing that it provides competitors with non-discriminatory access to loop makeup information. KPMG's testing of Qwest's OSS for loop makeup information patently failed to examine Qwest's systems under the appropriate standard. Even if KPMG's testing is accepted, the only thing that testing can establish by its very terms is that competitors obtain access to the same information Qwest's retail personnel access at the pre-ordering stage. As Qwest knows, however, this is a lower standard than the one Qwest is required to meet, as established by the Commission in previous section 271 proceedings. Specifically, the Commission has made clear:

[T]he relevant inquiry is not whether [the BOC's] retail arm has access to such underlying information but whether such information exists anywhere in [the BOC's] back office and can be accessed by any of [the BOC's] personnel.⁵

Under this standard, the only legally relevant inquiry is whether Qwest makes available to competitors all of the loop information available to any of its personnel, retail or back office, in the same time and manner it is available to them. Because KPMG's testing of Qwest's loop information OSS fails to meet this high standard, applied by the Commission in previous section 271 proceedings, neither Covad nor the Commission can have any confidence that Qwest provides competitors with access to all of the loop makeup information accessible by any Qwest personnel in Qwest's back office systems. Without such a showing, Qwest's applications for 271 authorization remain noncompliant with the standards established in the Commission's previous 271 orders, and cannot be granted.

³ See, e.g., Covad Comments WC Docket No. 02-314 at 9-11.

⁴ See Covad Comments in WC Docket No. 02-148 at 13-25; Covad Reply Comments in WC Docket No. 02-148 at 8-14; Covad Comments in WC Docket No. 02-189 at 23-38; and Covad Reply Comments in WC Docket No. 02-189 at 22-25.

⁵ See, e.g., *Application by SBC Communications Inc., et al., for Provision of In-Region, Inter-LATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, FCC 01-29, at para. 121.

In its reply comments in this proceeding, Covad explained in detail how new evidence uncovered in the Minnesota 271 hearings indicates that Qwest personnel do, in fact, have access to additional back office sources of loop information not made available to competitors.⁶ For example, the documentary evidence in the Minnesota proceeding established that Qwest employees have direct access to LFACS,⁷ can access information that will determine whether loops are incorrectly statused in LFACS, and maintain loop makeup records (that specifically address bridged tap and load coils) that are used to support Qwest's retail DSL efforts. Qwest has presented no evidence, however, that any of these sources of loop makeup information are made available to competitors. Moreover, these additional sources of loop makeup information would not have been discovered under the incorrect standard applied in KPMG's OSS testing. In addition, Covad uncovered evidence that Qwest uses a "shadow" process by which Qwest's load resource and allocation center ("LRAC") submit loop makeup updates. Until discovered by Covad, however, Qwest flatly denied that any such process could or ever would be used to update LFACS. This is thus the second time that Qwest has had to own up to the existence of processes (such as the pre-delivery MLT testing uncovered by AT&T) after its statements have been shown to be untrue.

Because of these obvious deficiencies in Qwest's evidentiary showing, in its previous filings Covad has requested that the Commission require Qwest to undergo an immediate audit of its loop information OSS. Covad has also requested that Qwest be required to provide competitors with pre-order access to MLT testing as a remedy for Qwest's failure to make the requisite evidentiary showing. As explained in Covad's November 4, 2002, *ex parte* letter, pre-order MLT testing is an extremely valuable source of information about the capabilities of a specific cable pair to support advanced services using line sharing. Specifically, pre-order MLT testing establishes the diagnostic characteristics of the loop, such as:

- Test OK, open, foreign voltage, etc.
- AC and DC signatures in Kilo Ohms
- Capacity balance
- Loop length from the Central Office
- Longitudinal Balance.⁸

Furthermore, as shown in Covad's recent *ex parte* letter dated November 21, 2002, the mere fact that Qwest arbitrarily labels the additional categories of information returned by MLT testing as "maintenance and repair" information does nothing to diminish the real value of the information that pre-order MLT testing would provide to competitors. In fact, the MLT returns a host of data points labeled "maintenance and repair" by Qwest which

⁶ See Covad Reply Comments in WC Docket 02-314 at 5-27.

⁷ The loop qualification database (LQDB) contains an extract of the information in LFACS, but not all of it.

⁸ See Letter from Praveen Goyal, Covad Communications, to Marlene Dortch, Federal Communications Commission, in WC Docket 02-314, dated November 4, 2002.

would indicate whether or not DSL could be successfully provisioned on a given loop, and therefore conclusively determine whether or not Covad would place a line shared loop order. In addition, unlike Qwest's RLDT tool, MLT testing provides real-time, cable-pair specific loop information. Thus, Qwest's attempts to mislead the Commission about the true value of the information returned through pre-order MLT testing must not be tolerated.⁹

As Covad has repeatedly shown throughout the course of Qwest's federal 271 application proceedings, Qwest has clearly failed to meet its evidentiary burden for obtaining section 271 authorization. Its positive, non-zero rates for the UNE HFPL in Colorado and Washington represent clear violations of the Commission's UNE pricing rules, and therefore of section 271. Furthermore, the only evidence Qwest has brought forward to demonstrate that its loop information OSS is checklist compliant is the results of KPMG's testing; as already explained, that testing falls by its very terms. Without an independent third party test of Qwest's loop information OSS, all the Commission is left with is Qwest's word that its OSS is checklist compliant.¹⁰ Given what we already know about Qwest's attempts to hide information about its MLT testing capabilities from Commission staff, the Commission cannot pass Qwest's 271 applications on this record alone. In light of these clear evidentiary deficiencies and violations of the Commission's rules, Qwest's applications for 271 authorization must not be approved.

The twenty-page limit does not apply as set forth in DA 02-2438.

Respectfully submitted,

/s/ Praveen Goyal

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⁹ See Letter from Praveen Goyal, Covad Communications, to Marlene Dortch, Federal Communications Commission, in WC Docket 02-314, dated November 21, 2002.

¹⁰ See, e.g., Qwest November 15 ex parte at 2-3. Qwest's simple assertion that it has made available to competitors all information relevant to loop qualification can hardly pass for a sufficient evidentiary record.